



**RECENT COURT DECISIONS VETERANS ADVOCATES NEED TO KNOW ABOUT SEPTEMBER 2021-FEBRUARY 2022**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org

---

---

---

---

---

---

---

---

**PRESENTER** 

**Byron Moore**

- **Appellate Attorney, NVLSP**
  - **Previously: Associate Counsel, Board of Veterans' Appeals**
- **Co-author, *Veterans Benefits Manual***
- **Mentor, Veterans Consortium Pro Bono Program**
- **Judge, 2021 National Veterans Law Moot Court Competition**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org

---

---

---

---

---

---

---

---

**AGENDA** 

**Federal Circuit:**

- **Lynch** (Dec. 17, 2021) – What is the meaning of the “benefit of the doubt” standard of proof and can it be satisfied when evidence for and against the claimant is not equal?
- **Philbrook** (Oct. 8, 2021) – Whether Vet’s confinement in a state hospital or mental institution in connection with a criminal judgment precludes assignment of TDIU

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org

---

---

---

---

---

---

---

---

**AGENDA**



**Federal Circuit Cont.:**

- Gurley (Jan. 20, 2022) – Whether VA can make a post-incarceration decision to reduce a Vet’s benefits retroactively for a period of incarceration
- Atilano (Sept. 14, 2021) – Whether 38 U.S.C. § 7107 requires a Vet to personally appear at a BVA hearing
- Breland (Jan. 11, 2022) – Whether VA must continue a 100% disability rating for a cancer until it performs a mandatory exam six months following treatment, when the rating is assigned retroactively after the six-month period has passed

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 4

---

---

---

---

---

---

---

---

**AGENDA**



**CAVC:**

- Foster (Oct. 20, 2021) – Whether, under DC 7258, cessation of a prostate cancer rating of 100% following the end of treatment and a mandatory VA exam 6-months later is a “rating reduction”
- Wilson (Dec. 21, 2021) – When rating hypertension, must VA consider BP readings taken before the Vet started taking medication to determine if the Vet has “a history of diastolic pressure predominantly 100 or more,” if those readings were taken before the rating period?

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 5

---

---

---

---

---

---

---

---

**AGENDA**



**CAVC Cont.:**

- Spicer (Sept. 14, 2021) – Whether secondary SC can be established based on the natural progression of a condition that might have been less severe but for a service-connected disability
- Snider (Nov. 19, 2021) – What standard must VA use when determining whether referral for extraschedular TDIU consideration is warranted?
- Perciavalle (Dec. 3, 2021) – Was a CUE motion alleging that VA erred in 1972 by failing to assign separate ratings for knee disabilities based on a change in interpretation of the law and, if so, was any Board error in deciding this issue prejudicial?

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 6

---

---

---

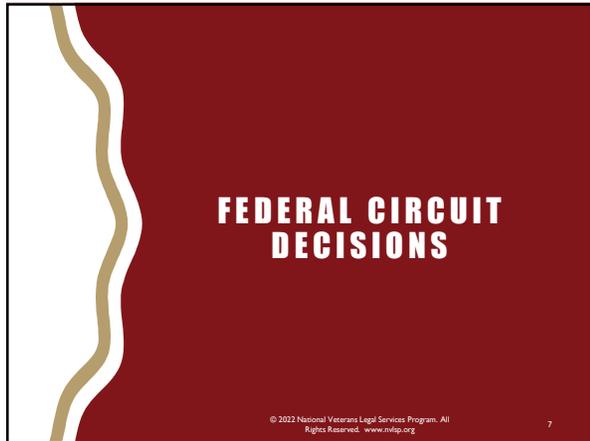
---

---

---

---

---



**FEDERAL CIRCUIT  
DECISIONS**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org

7

---

---

---

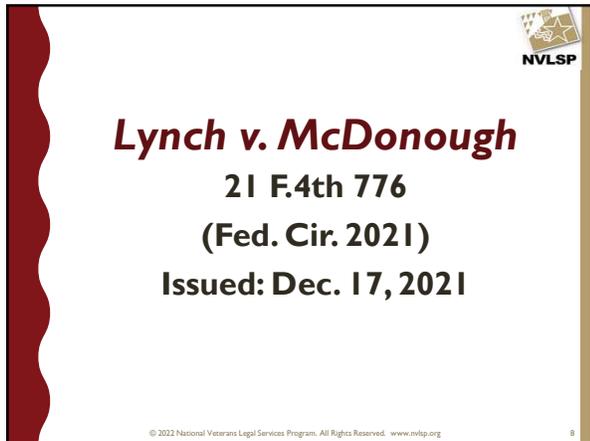
---

---

---

---

---



**NVLSP**

***Lynch v. McDonough***  
**21 F.4th 776**  
**(Fed. Cir. 2021)**  
**Issued: Dec. 17, 2021**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org

8

---

---

---

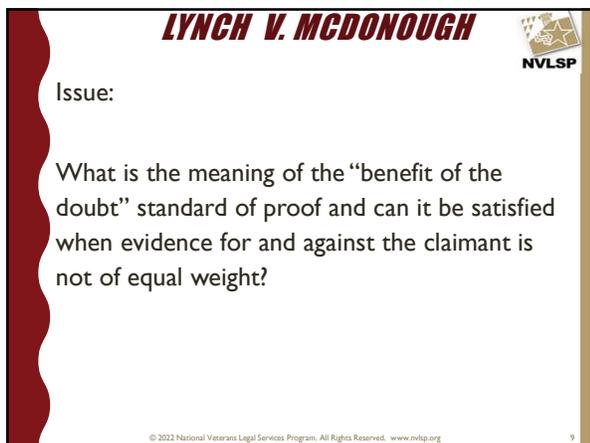
---

---

---

---

---



***LYNCH V. MCDONOUGH***

**NVLSP**

Issue:

What is the meaning of the “benefit of the doubt” standard of proof and can it be satisfied when evidence for and against the claimant is not of equal weight?

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org

9

---

---

---

---

---

---

---

---

**LYNCH V. MCDONOUGH** 

**Underlying Legal Framework**

- “When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, **the Secretary shall give the benefit of the doubt to the claimant.**”
  - 38 U.S.C. § 5107
- Evidence is in approximate balance when the evidence in favor of and opposing the veteran’s claim is found to be almost exactly or nearly equal.
  - *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvls.org 10

---

---

---

---

---

---

---

---

---

---

**LYNCH V. MCDONOUGH** 

**Underlying Legal Framework**

- “When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. **By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim.**”
  - 38 C.F.R. § 3.102

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvls.org 11

---

---

---

---

---

---

---

---

---

---

**LYNCH V. MCDONOUGH** 

**FACTS**

- VA granted Vet SC for PTSD and assigned a 30% rating based on conflicting VA and private exam reports
- Vet filed an NOD and two additional psych evals conducted by a private psychiatrist
- Vet underwent a second VA PTSD exam, where the examiner documented Vet’s symptoms and addressed the conflicting medical opinions
  - Examiner found that the private psychiatrist’s conclusions “were more extreme than what was supported by available evidence”
- RO continued Vet’s 30% rating

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvls.org 12

---

---

---

---

---

---

---

---

---

---

**LYNCH V. MCDONOUGH** 

- BVA denied Vet's appeal, finding that the evidence showed he did not have social and occupational impairment manifested by reduced reliability and productivity that would warrant a disability rating greater than 30%
  - BVA noted that the private examiners described more severe impairment than that identified by the VA examiner, and found that it was not supported by the subjective symptoms
  - **BVA concluded that "the preponderance of the evidence is against the claim"**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 13

---

---

---

---

---

---

---

---

**LYNCH V. MCDONOUGH** 

- Vet appealed to CAVC, arguing that BVA misapplied 38 U.S.C. § 5107(b) and wrongly found that he was not entitled to the "benefit of the doubt"
- CAVC rejected Vet's argument and affirmed BVA decision
  - Reasoned that the doctrine of reasonable doubt did not apply "because the preponderance of the evidence is against the claim."
  - **CAVC relied on Ortiz, which stated that "the benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant."**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 14

---

---

---

---

---

---

---

---

**LYNCH V. MCDONOUGH** 

- Fed. Circuit affirmed CAVC and BVA decisions:
  - Rejected Vet's argument that *Ortiz* was wrongly decided because it set forth an "equipoise of the evidence" standard to trigger the benefit-of-the-doubt rule
  - "Under § 5107(b) and *Ortiz*, a claimant is to receive the benefit of the doubt when there is an 'approximate balance' of positive and negative evidence, which *Ortiz* interpreted as 'nearly equal' evidence. This interpretation necessarily includes scenarios where the evidence is not in equipoise but nevertheless is in approximate balance. Put differently, if the positive and negative evidence is in approximate balance (which includes but is not limited to equipoise), the claimant receives the benefit of the doubt."

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 15

---

---

---

---

---

---

---

---

**LYNCH V. MCDONOUGH** 

- To eliminate confusion about the meaning of the benefit-of-the-doubt rule going forward, the Fed. Circuit clarified that:
  - “the benefit-of-the-doubt rule simply applies if the competing evidence is in ‘approximate balance,’ which *Ortiz* correctly interpreted as evidence that is ‘nearly equal.’ ”
  - “As a corollary, evidence is not in ‘approximate balance’ or ‘nearly equal,’ and therefore the benefit-of-the-doubt rule does not apply, when the evidence persuasively favors one side or the other.”

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 16

---

---

---

---

---

---

---

---

**LYNCH V. MCDONOUGH** 

- Fed. Circuit concluded that, in this case, the Board made extensive findings that showed it was persuaded that the Vet was not entitled to a rating greater than 30% for PTSD
  - Thus, the evidence was not in approximate balance and the benefit-of-the-doubt rule did not apply

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 17

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE** 

- To satisfy the benefit-of-the-doubt standard, the evidence needs to be “nearly equal,” not exactly equal
  - The claimant can be given the benefit of the doubt when the evidence weighs (slightly) *against* the claimant
  - The evidence must be “persuasively” against the claimant for the benefit of the doubt not to apply
- In cases where there is competing evidence on an issue, argue that it is “nearly equal” and “not persuasively against the claimant”; therefore, the benefit of the doubt should be given to the claimant

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 18

---

---

---

---

---

---

---

---

  
NVLSP

***Philbrook v. McDonough***  
15 F.4th 1117  
(Fed. Cir. 2021)  
Issued: Oct. 8, 2021

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 19

---

---

---

---

---

---

---

---

***PHILBROOK V. MCDONOUGH***   
NVLSP

Issue:

Whether a Vet's confinement in a state hospital or mental institution in connection with a criminal judgment precludes TDIU

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 20

---

---

---

---

---

---

---

---

***PHILBROOK V. MCDONOUGH***   
NVLSP

**Underlying Legal Framework**

- 38 U.S.C. § 5313 limits the payment of compensation to Vets incarcerated for conviction of a felony
- § 5313(c) prohibits VA from awarding TDIU during any period during which Vet is incarcerated in a penal institution or correctional facility for conviction of a felony
- Under 38 C.F.R. § 3.341, TDIU which would first become effective while a Vet is incarcerated "shall not be assigned during such period of incarceration"

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 21

---

---

---

---

---

---

---

---

**PHILBROOK V. MCDONOUGH** 

**FACTS**

- Vet awarded SC for PTSD following service
- Years later, Vet stipulated to a judgment of “guilty except for insanity” in connection with a felony under Oregon state law
- Vet was put in the custody of the Oregon State Hospital for treatment and care not to exceed 20 years
- While in custody at the hospital, Vet sought TDIU

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 22

---

---

---

---

---

---

---

---

**PHILBROOK V. MCDONOUGH** 

- The RO denied TDIU, finding that Vet’s PTSD did not preclude employment
- Vet appealed to BVA
- Relying on 38 U.S.C. § 5313(c), BVA denied his claim as a matter of law
- CAVC affirmed BVA’s denial, holding that a Vet committed to the custody of a state hospital in connection with a criminal judgment is ineligible for TDIU

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 23

---

---

---

---

---

---

---

---

**PHILBROOK V. MCDONOUGH** 

- Federal Circuit reversed CAVC’s decision:
  - Found that Vet was not confined to a penal institution or correctional facility, but rather a mental institution
  - Noted that a “correctional facility” cannot encompass a hospital that treats civil patients, and a hospital cannot be a correctional facility for some patients and not others
  - Because the Oregon State Hospital was not a “penal institution or correctional facility” under § 5313(c), Vet was not barred from receiving TDIU as a matter of law

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 24

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE** 

- If Vet or DIC beneficiary is confined to a mental institution in connection with committing a felony:
  - Vet not precluded from TDIU
  - Payment of disability compensation or DIC should not be reduced under § 5313(a)
- If VA reduces payments, cite *Philbrook* and argue that reduction contrary to law because a mental institution is not a “penal institution or correctional facility”

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 25

---

---

---

---

---

---

---

---



***Gurley v. McDonough***  
**No. 2021-1490**  
**(Fed. Cir. Jan. 20, 2022)**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 26

---

---

---

---

---

---

---

---

**GURLEY V. MCDONOUGH** 

Issue:

Whether VA can make a post-incarceration decision to reduce a Vet’s benefits retroactively for the specified period of incarceration

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 27

---

---

---

---

---

---

---

---

***GURLEY V. MCDONOUGH*** 

**Underlying Statutory Framework**

- 38 U.S.C. § 5313(a)(1) states that a Vet convicted of a felony shall not be paid compensation in an amount that exceeds specified rates for the period beginning on the 61<sup>st</sup> day of incarceration and ending the day the incarceration ends

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org 28

---

---

---

---

---

---

---

---

---

---

***GURLEY V. MCDONOUGH*** 

**FACTS**

- Since 1997, Vet was receiving TDIU
- 2011: Vet convicted of a felony and incarcerated for nearly six months.
- Vet received his full VA benefits during the entirety of his incarceration, because VA did not learn of his incarceration until six days after his release, when VA compared its records with those of the Social Security Administration

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org 29

---

---

---

---

---

---

---

---

---

---

***GURLEY V. MCDONOUGH*** 

- VA retroactively reduced Vet's benefits to recoup the payment he wrongly received during incarceration
- Vet appealed the debt to the Board and the CAVC, which both affirmed the validity of the debt and the retroactive benefit reduction
  - Vet argued that reduction was not appropriate because he was no longer incarcerated

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org 30

---

---

---

---

---

---

---

---

---

---

**GURLEY V. MCDONOUGH**



- Fed. Circuit also affirmed, holding
  - 38 U.S.C. § 5313(a)(1) “creates a rule that a veteran convicted of a felony ‘shall not be paid compensation [including disability compensation]... in an amount that exceeds’ specified rates ‘for the period beginning’ on the 61st day of incarceration ‘and ending on the day’ the incarceration ends.”
  - “The only temporal aspect of the provision is one that addresses the period ‘for’ which the veteran is to receive benefits. The provision does not use language that addresses the time at which VA must make its reduction decision regarding those benefits. It addresses payments ‘for’ the incarceration period, providing for specified reductions.”

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 31

---

---

---

---

---

---

---

---

**TAKE AWAY**



- Vets can't avoid having their benefits reduced for a period of incarceration for a felony by waiting to notify VA about their imprisonment or hoping VA won't find out about the incarceration until after the Vet is released
- Retroactive reduction and recoupment is appropriate in these situations

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 32

---

---

---

---

---

---

---

---

**Atilano v. McDonough**  
 12 F.4th 1375  
 (Fed. Cir. 2021)  
 Issued: Sept. 14, 2021



© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 33

---

---

---

---

---

---

---

---

**ATILANO V. MCDONOUGH**   
 NVLS

Issue:

Whether 38 U.S.C. § 7107 requires that a Veteran personally appear for a BVA hearing

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 34

---

---

---

---

---

---

---

---

**ATILANO V. MCDONOUGH**   
 NVLS

**Underlying Legal Framework**

- 38 U.S.C. § 7107(b) (2018) (pre-AMA) provides that “[t]he Board shall decide any appeal only after affording the appellant an opportunity for a hearing”
- 38 C.F.R. § 20.700 describes a Vet’s right to a hearing, in addition to explaining its purpose and *nonadversarial* nature of the hearing
- 38 C.F.R. § 20.702(b) allows the Board to solicit testimony when a Vet or their Rep are unable to attend the hearing, for *good cause*

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 35

---

---

---

---

---

---

---

---

**ATILANO V. MCDONOUGH**   
 NVLS

**FACTS**

- Vet challenged the ratings and effective dates assigned to his SC PTSD
- He appealed to BVA and requested a hearing
- On the day of the hearing, Vet’s counsel and a medical expert appeared before the Board, *but Vet did not*
  - **Vet was unable to attend because of his severe disabilities**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 36

---

---

---

---

---

---

---

---

**ATILANO V. MCDONOUGH** 

- VLJ refused to hear the medical expert's testimony absent the presence of the Vet
  - Unable to present live expert testimony, Vet's counsel requested a 60-day extension of time to submit written evidence and argument
- BVA ultimately denied Vet's IR PTSD claim, as well as other related claims

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 37

---

---

---

---

---

---

---

---

**ATILANO V. MCDONOUGH** 

- BVA found that the *submitted* medial expert report was inconsistent with objective medical findings
- Addressing the VLJ's refusal to let the expert testify at the hearing, BVA noted that "the purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue," and that "[i]t is contemplated that the appellant and witnesses, if any, will be present."
- BVA noted that "[i]f the Veteran, either on his own or by way of his attorney, had provided good cause for his failure to appear at the hearing, then the presiding Board member can allow for testimony
  - BVA found the Vet's cause—that he was too disabled to attend—did not satisfy the good cause requirement

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 38

---

---

---

---

---

---

---

---

**ATILANO V. MCDONOUGH** 

- After CAVC affirmed BVA decision, Vet appealed to Fed. Circuit
- Fed. Circuit concluded that 38 U.S.C. § 7107 does not unambiguously require an appellant to be present at a BVA hearing for his legal representative to elicit sworn testimony from witnesses before the Board
  - Remanded for CAVC to address whether 38 C.F.R. §§ 20.700(b) and 20.702(d) require Vet's attendance or something less; whether those regs warrant deference as an interpretation of a statute; and, if so, whether regulatory adoption of VA's position is contrary to unambiguous statutory language and is not an unreasonable resolution of language that is ambiguous
  - Noted that the effect on vets so disabled they cannot be present in person seemed relevant to at least the reasonableness issue

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 39

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE**



- Stay tuned for CAVC decision...
  - VA filed brief on 2/10/2022
  - Vet’s brief due by 3/14/2022
  
- Decision will determine (subject to appeal), whether VA regs requiring claimant to be present at BVA hearing, except for good cause, are valid
  - In other words, if a Vet’s representative can have an expert provide testimony at a BVA hearing without the Vet present, even when the Vet does not have good cause for being absent

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 40

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE**



- For the time being, ensure Vets are present at their hearings, even if they do not intend to speak or are too disabled to contribute to the hearing
- Alternatively, request that the representative appear alone to personally present evidence and argument
  - But must show “good cause” for solo appearance
  - Be clear on the intent to present evidence, as opposed to mere argument

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 41

---

---

---

---

---

---

---

---

**Breland v. McDonough**  
 22 F.4th 1347  
 (Fed. Cir. 2022)  
 Issued: January 11, 2022



© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 42

---

---

---

---

---

---

---

---

**BRELAND V. MCDONOUGH** 

**NVLSP**

Issue:

Whether VA must continue a 100% disability rating for a cancer until it performs a “mandatory VA examination” six months following treatment, when the rating is assigned retroactively after the six-month period has passed

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 43

---

---

---

---

---

---

---

---

---

---

**BRELAND V. MCDONOUGH** 

**NVLSP**

**Underlying Regulatory Framework**

- Tongue cancer is rated under 38 C.F.R. § 4.114, DC 7343 — Malignant neoplasms of the digestive system, exclusive of skin growths:

7343 Malignant neoplasms of the digestive system, exclusive of skin growths .....	100
---	-----

NOTE: A rating of 100 percent shall continue beyond the cessation of any surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure. Six months after discontinuance of such treatment, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local recurrence or metastasis, rate on residuals.

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 44

---

---

---

---

---

---

---

---

---

---

**BRELAND V. MCDONOUGH** 

**NVLSP**

**FACTS**

- 10/2006: Vet dx with tongue cancer
- 12/2006: Vet filed claim for SC for tongue cancer
- 1/2007: Vet completed cancer treatment
- 12/2007: VA denied claim
- 1/2008: Biopsy revealed recurrence of tongue cancer
- 2/2008: Vet underwent surgery for tongue cancer
- 12/2008: Vet appealed denial of claim

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 45

---

---

---

---

---

---

---

---

---

---

**BRELAND V. MCDONOUGH** 

- 9/2015: RO granted SC for tongue cancer and assigned a *staged* 100% disability rating under DC 7343, based on his “active malignancy [cancer] and treatment period”
  - 100% rating effective from 12/2006 to 7/2007, six months after the conclusion of his treatment (8 months total)
  - 0% rating effective 8/1/2007

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 46

---

---

---

---

---

---

---

---

---

---

**BRELAND V. MCDONOUGH** 

- 8/2016: Vet filed NOD, noting that he had experienced residual conditions related to tongue cancer treatment
- 2/2018: VA assigned ratings to his residual conditions and determined that a 100% rating was warranted from 1/2008 until 9/2008
- In total, VA assigned two 100% ratings for tongue cancer a period of nearly 16 months

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 47

---

---

---

---

---

---

---

---

---

---

**BRELAND V. MCDONOUGH** 

- Vet appealed to BVA, arguing that VA failed to correctly apply the note to DC 7343
  - VA did not conduct a “mandatory VA exam” six months after the end of his cancer treatment to determine “the appropriate disability rating” at that time
  - He was entitled to a 100% rating from 2006 to 2017, when he was finally provided a VA exam to determine the appropriate rating
- BVA rejected the argument, explaining that because the 100% ratings “were assigned retroactively,” performing VA exams at “the conclusion of the pertinent 6-month periods following cessation of treatment could not have been accomplished.”
- CAVC affirmed the Board’s decision

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 48

---

---

---

---

---

---

---

---

---

---

**BRELAND V. MCDONOUGH** 

- Federal Circuit affirmed:
  - The plain language of the note to DC 7343 demonstrated that it could not apply to a rating retroactively assigned after the 6-month date
  - The note is clear that the requirement for a mandatory VA exam applies only to prospective rating changes that may result in reductions to “compensation payments *currently being made*” and not to retroactive assignments

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 49

---

---

---

---

---

---

---

---

**TAKE AWAY** 

- If a DC (primarily for cancer) provides that VA must continue a 100% rating until a mandatory VA exam is conducted after the end of treatment for the condition, that requirement does not apply when assigning a rating retroactively
  - Requirement only applies to prospective ratings
- VA can consider available medical evidence to determine end date of treatment and when cancer was active when assigning rating retroactively

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 50

---

---

---

---

---

---

---

---

**CAVC DECISIONS**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 51

---

---

---

---

---

---

---

---



**Foster v. McDonough**  
**34 Vet.App. 338 (2021)**  
**Issued: Oct. 20, 2021**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org

52

---

---

---

---

---

---

---

---

**FOSTER V. MCDONOUGH**



Issue:

Whether, under DC 7258, cessation of a prostate cancer rating of 100% following the end of treatment and a mandatory VA exam 6-months later is “a rating reduction”

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org

53

---

---

---

---

---

---

---

---

**FOSTER V. MCDONOUGH**



**Underlying Regulatory Framework**

- Prostate cancer is rated under 38 C.F.R. § 4.115b DC 7528, Malignant neoplasms of the genitourinary system:

7528 Malignant neoplasms of the genitourinary system	100
--	-----

Note—Following the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure, the rating of 100 percent shall continue with a mandatory VA examination at the expiration of six months. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of §3.105(e) of this chapter. If there has been no local recurrence or metastasis, rate on residuals as voiding dysfunction or renal dysfunction, whichever is predominant.

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org

54

---

---

---

---

---

---

---

---

**FOSTER V. MCDONOUGH** 

**FACTS**

- Sept. 2014: VA granted Vet SC for prostate cancer based on AO exposure and assigned a 100% rating for active malignancy under DC 7528
- Oct. 2015: VA review exam revealed Vet's prostate cancer was in remission
- Oct. 2016: VA exam revealed that Vet had active cancer, for which he received treatment
  - RO continued 100% rating and informed Vet of "a likelihood of improvement" and that 100% rating was not considered permanent and was subject to a future review exam

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 55

---

---

---

---

---

---

---

---

---

---

**FOSTER V. MCDONOUGH** 

- July 2017: VA review exam noted Vet's prostate cancer was in remission
  - RO proposed to discontinue 100% rating, assign a 10% rating, and make other related changes to Vet's benefits
  - Oct 2018: VA issued rating decision implementing proposed changes
- Vet appealed to BVA

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 56

---

---

---

---

---

---

---

---

---

---

**FOSTER V. MCDONOUGH** 

- BVA denied appeal, noting that DC 7528 contains a temporal element for continuance of a 100% rating for prostate cancer residuals, and that the action was not a "rating reduction" as that term is commonly understood
- BVA also found no basis for continuance of the 100% rating for prostate cancer under DC 7528
- BVA noted that Vet was no longer receiving surgical, x-ray, antineoplastic chemotherapy, or other therapeutic procedures for prostate cancer, as required for a 100% rating

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 57

---

---

---

---

---

---

---

---

---

---

**FOSTER V. MCDONOUGH** 

- Vet appealed to CAVC and argued:
  - DC 7528 requires a Vet to undergo a mandatory exam 6 months after treatment ends, but does not require a rating reduction at that time
  - He was prejudiced because if the Board had classified the end of his 100% rating as a rating reduction, he would have had the benefit of VA regs that govern rating reductions, including 38 C.F.R. § 3.343(a), which requires a showing of material improvement under the ordinary conditions of life for a reduction to be proper

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 58

---

---

---

---

---

---

---

---

**FOSTER V. MCDONOUGH** 

- CAVC held that BVA did not err when it affirmed the discontinuance of the 100% disability rating under the plain terms of DC 7528
  - A discontinuance is not a rating reduction in the traditional sense, but is instead part of the initial rating assigned for the condition
  - Rating reduction rules of § 3.343, including requirement of a showing of material improvement, did not apply because they would render parts of the regs redundant
    - DC 7528 provides its own measure of improvement for prostate cancer—cessation of treatment and no cancer recurrence or metastasis based on a mandatory exam

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 59

---

---

---

---

---

---

---

---

**TAKE AWAY** 

- If a DC has a time requirement for ending a certain rating percentage (namely 100% ratings for various cancers), the discontinuance of that rating percentage is not a “rating reduction”
  - The special rules that apply to rating reductions are not implicated
  - Instead, the rating percentage ends within the time set forth in the DC and, if provided for in the DC, after the Vet is provided notice of the discontinuance and a chance to show that the current rating should be continued
  - VA adjudicators simply need to apply the DC’s procedures, including any temporal components, as written

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 60

---

---

---

---

---

---

---

---

  
NVLSP

## *Wilson v. McDonough*

### No. 19-2021

### (Vet. App. Dec. 20, 2021)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 61

---

---

---

---

---

---

---

---

  
NVLSP

## *WILSON V. MCDONOUGH*

Issue:

When rating hypertension, whether VA must consider blood pressure readings taken before the Vet started taking medication, in order to determine if the Vet has “a history of diastolic pressure predominantly 100 or more,” if those readings were taken before the rating period at issue

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 62

---

---

---

---

---

---

---

---

  
NVLSP

## *WILSON V. MCDONOUGH*

### Underlying Legal Framework

- Hypertension is rated under 38 C.F.R. § 4.104, DC 7101
  - Hypertensive vascular disease (hypertension and isolated systolic hypertension):

<p>30 7101 Hypertensive vascular disease (hypertension and isolated systolic hypertension):</p> <p>40 Diastolic pressure predominantly 130 or more</p> <p>10 Diastolic pressure predominantly 120 or more</p> <p>100 Diastolic pressure predominantly 110 or more, or systolic pressure predominantly 200 or more</p> <p>10 Diastolic pressure predominantly 100 or more, or systolic pressure predominantly 160 or more, or minimum evaluation for an individual with a history of diastolic pressure predominantly 100 or more who requires antihypertensive medication for control</p> <p>NOTE (1): Hypertension or isolated systolic hypertension must be confirmed by readings taken on or more times on at least three different days. For purposes of this section, the term hypertension means that the diastolic blood pressure is predominantly 90mm, or greater, and isolated systolic hypertension means that the systolic blood pressure is predominantly 160mm, or greater, with a diastolic blood pressure of less than 90mm.</p> <p>NOTE (2): Evaluate hypertension, which is usually the secondary or the type, as part of the condition causing it rather than its separate evaluation.</p> <p>NOTE (3): Evaluate hypertension separately from hypertensive heart disease and other types of heart disease.</p>	<p>40</p> <p>40</p> <p>20</p> <p>10</p> <p>10</p>
---	---

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 63

---

---

---

---

---

---

---

---

**WILSON V. MCDONOUGH**  NVLS

**Underlying Legal Framework**

- VA Adjudication Procedures Manual M21-1 states:
  - When current predominant blood pressure readings are non-compensable, a 10-percent evaluation may be assigned if
    - continuous medication is required for blood pressure control, and
    - past diastolic pressure (**before medication was prescribed**) was predominantly 100 or greater.
  - (emphasis added) Manual M21-1, V.iii.5.3.e (change date Nov. 15, 2021) (previously located at Manual M21-1, V.iii.5.3.b)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 64

---

---

---

---

---

---

---

---

---

---

**WILSON V. MCDONOUGH**  NVLS

**FACTS**

- During service in 1991, Vet's diastolic BP readings were 100, 90, 88, 116, 120, 118, 106, and 94. Based on these readings, he was diagnosed with uncontrolled hypertension and prescribed medication.
- After starting meds, his diastolic readings in service were 85, 75, 80, and 90
- Since leaving service, he has been taking meds continuously, which have controlled his HTN

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 65

---

---

---

---

---

---

---

---

---

---

**WILSON V. MCDONOUGH**  NVLS

**FACTS**

- 2003: Vet granted SC for HTN with a 0% rating
- 2008: Vet filed claim for increased rating, which BVA ultimately denied
- 2018: CAVC issued Mem Dec remanding case for BVA to explain why it departed from Manual M21-1 provision
  - Even though it wasn't binding on BVA, the failure to discuss the provision rendered its reasons or bases inadequate

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 66

---

---

---

---

---

---

---

---

---

---

**WILSON V. MCDONOUGH** 

- May 2019: BVA again denied a compensable rating for hypertension
  - BVA said the M21-1 provision only applied to the assignment of an initial rating for hypertension
  - Provision was irrelevant to Vet's increased rating claim

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 67

---

---

---

---

---

---

---

---

**WILSON V. MCDONOUGH** 

- On return to CAVC, the Court found that BVA clearly erred in declining to assess Vet's pre-rating period BP readings
  - Plain text of DC 7101 directs VA to consider historical, rather than current, blood readings and the relevant "historical blood pressure readings" are those taken before the Vet began medication
  - This interpretation is supported by both the text of the regulation and Manual M21-1
    - Because DC 7101 acknowledges that a Vet can control hypertension with medication, the most natural reading of the phrase "history of diastolic pressure of 100 or greater" is that it refers to BP readings before such readings were subdued by medication

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 68

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE** 

- If Vet does not have *current* BP readings that support a compensable rating, Vet will qualify for a 10% rating for SC HTN if:
  - Vet requires continuous medication to control BP, AND
  - Before the medication was prescribed, Vet's diastolic pressure was predominantly 100 or more
- If VA doesn't consider BP readings taken before medication was prescribed because they were before the rating period under consideration, seek higher-level review or appeal to BVA and cite *Wilson*

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 69

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE** 

- Predominantly = more readings than not
- Readings to be considered are those taken as part of the diagnostic workup during the period leading to the prescription of medication
- VA should not consider readings taken long before dx or minimally hypertensive readings prior to active medical surveillance / observation leading to the prescription of meds

– Manual M21-1, V.ii.5.3.e (change date Nov. 15, 2021)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org 70

---

---

---

---

---

---

---

---



**Spicer v. McDonough**  
**34 Vet.App. 310 (2021)**  
**Issued: Sept. 14, 2021**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org 71

---

---

---

---

---

---

---

---

**SPICER V. MCDONOUGH** 

Issue:

Whether 38 U.S.C. § 1110 provides for compensation for the natural progression of a condition which is not caused or aggravated by a service-connected disability, but that might have been less severe were it not for the service-connected disability

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlp.org 72

---

---

---

---

---

---

---

---

**SPICER V. MCDONOUGH**  NVLS

**Underlying Statutory Framework**

- For disability **resulting from** personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, air, or space service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter . . . .
- 38 U.S.C. § 1110

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 73

---

---

---

---

---

---

---

---

---

---

**SPICER V. MCDONOUGH**  NVLS

**Underlying Regulatory Framework**

- Any increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will be service connected. . . .
- 38 C.F.R. § 3.110(b)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 74

---

---

---

---

---

---

---

---

---

---

**SPICER V. MCDONOUGH**  NVLS

**FACTS**

- Vet sought compensation for a bilateral leg weakness and instability, diagnosed as arthritis, on the theory that his disability was secondary to SC leukemia
- Vet did not argue that leukemia caused or aggravated his bilateral leg disability, but instead argued that he should be compensated because treatment he received for his leukemia prevented him from undergoing surgery that could have alleviated his leg disability
  - BL knee replacement surgery was canceled because the chemotherapy he was undergoing to treat leukemia had depressed his hemocrit (red blood cell) level
  - Was told his hematocrit level would never rise to a level that would permit him to have such surgery

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 75

---

---

---

---

---

---

---

---

---

---

**SPICER V. MCDONOUGH** 

**FACTS**

- BVA determined that the law didn't authorize disability compensation based on such a theory
- At the CAVC, Vet argued that notwithstanding any regulation, VA disability compensation laws authorize service connection under these circumstances

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 76

---

---

---

---

---

---

---

---

**SPICER V. MCDONOUGH** 

- CAVC rejected Vet's argument, and affirmed the BVA's denial of the claim:
  - Focused on the term "resulting from" in 38 U.S.C. § 1110 and held that it requires actual causality
    - The causal agent, in some fashion, brings into being the resulting condition
  - The natural progression of a condition not caused or aggravated by SC disability, which nonetheless might have been less severe were it not for such disability, was too attenuated a theory to warrant compensation

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 77

---

---

---

---

---

---

---

---

**SPICER V. MCDONOUGH** 

- CAVC found:
  - Arthritis did not, in any reasonable sense of the phrase, "result from" Vet's SC cancer or the chemo provided to treat it
    - There was no contention that cancer or chemo caused the arthritis or made it worse
    - Current knee functionality was not a consequence or effect of these service-related agents
    - At most, cancer and chemo interfered with attempts through affirmative intervention to alter the arthritis's natural progress
  - Unless the current state of his arthritis would not exist in the absence of his cancer or chemo, there is no actual but-for causation, which is required by 38 U.S.C. § 1110

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 78

---

---

---

---

---

---

---

---

**HYPOTHETICAL**



- Vet suffers from SC PTSD and GERD
- GERD is not related to the PTSD, and PTSD is not of a sufficient severity to aggravate GERD sx's
- Vet's PTSD medication has a deadly interaction with a popular GERD medication formula, such that he cannot take the only type of GERD medication that could relieve his symptoms
- The GERD sx's, while very annoying, are not of a sufficient severity to warrant surgery
- Vet files for SC for GERD as related to his PTSD, arguing that he would not suffer from GERD but for his PTSD

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 79

---

---

---

---

---

---

---

---

**SURVEY**



- **What is the outcome under Spicer?**
  - A. Vet is granted SC on a secondary basis because GERD is causally related to PTSD
  - B. Vet is granted SC on an aggravation basis because PTSD aggravates GERD
  - C. Vet is denied SC because the relationship between PTSD and GERD is too attenuated

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 80

---

---

---

---

---

---

---

---

**SURVEY #1**



C

VA denies SC because the relationship between PTSD and GERD is too attenuated

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 81

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE** 

- **Stay tuned...**
  - We have appealed *Spicer* to the Federal Circuit
    - Opening brief filed 2/22/2022
    - Decision late-2022 / early 2023?
- **Continue to pursue secondary SC claims under theory that SC condition prevents treatment that would alleviate severity of the secondary disability**
  - VA will deny claim, but keep claim alive by seeking review / appealing until *Spicer* decided by Fed. Circuit (or ask VA not to decide case until *Spicer* resolved)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 82

---

---

---

---

---

---

---

---

---

---



***Snider v. McDonough***  
**No. 19-6707**  
**(Vet.App. Nov. 19, 2021)**

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 83

---

---

---

---

---

---

---

---

---

---

***SNIDER V. MCDONOUGH*** 

Issue:

What standard must VA use for determining whether referral for extraschedular TDIU consideration is warranted?

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 84

---

---

---

---

---

---

---

---

---

---

**SNIDER V. MCDONOUGH** 

**Underlying Legal Framework**

- 38 C.F.R. § 4.16(b) provides that Vets who are unable to secure and follow a substantially gainful occupation by reason of SC disabilities shall be rated totally disabled
  - Rating boards should refer to the Director, Compensation Service, for extra-schedular consideration all cases of veterans who are unemployable by reason of service-connected disabilities, but who fail to meet the percentage standards set forth in paragraph (a) of this section
- BVA's initial extraschedular referral decision under 38 C.F.R. § 4.16(b) addresses whether there is sufficient evidence to substantiate a *reasonable possibility* that a Vet is unemployable because of SC disabilities
  - *Ray v. Wilkie*, 31 Vet. App. 58, 65-66 (2019)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 85

---

---

---

---

---

---

---

---

---

---

**SNIDER V. MCDONOUGH** 

**FACTS**

- Vet SC for:
  - Hemorrhoids rated 20% disabling
  - Sinusitis rated 10% disabling
- In May 2019, Vet applied for TDIU

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 86

---

---

---

---

---

---

---

---

---

---

**SNIDER V. MCDONOUGH** 

- Vet reported:
  - He had experience overseeing a bar & restaurant and delivering flowers
  - To control his sinusitis symptoms, he used Breathe Right strips and needed medication 6x a day, requiring him to be in a sitting position with his head tilted back and then nose blowing to clear the debris
  - He regularly applied hemorrhoid ointments
  - A restaurant or bar would not hire him because of his need to often use the bathroom to perform his medical treatments and because customers did not want to see his unpleasant symptoms while eating and drinking
  - He would be unable to deliver flowers full time given his need for frequent bathroom stops

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 87

---

---

---

---

---

---

---

---

---

---

**SNIDER V. MCDONOUGH** 

- On appeal, the Board denied TDIU, finding
  - Referral for extraschedular TDIU consideration was not warranted because *the evidence did not show that the Vet's sinusitis and hemorrhoids rendered him unable to obtain or maintain substantially gainful employment*
  - Vet's treatment regimen did not take an extraordinary amount of time each day and could be performed during non-work hours or while on breaks
  - Vet's symptoms would not interfere with the tasks of a delivery person
  - Vet had management skills that were transferrable to industries not involving food or extensive contact with customers

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 88

---

---

---

---

---

---

---

---

**SNIDER V. MCDONOUGH** 

- Vet argued that BVA erred by not addressing his TDIU claim under Ray's "reasonable possibility" standard
- VA argued that Ray didn't apply because it addressed a different scenario in which BVA initially referred the TDIU claim for extraschedular consideration, and in a later decision affirmed the Director of Comp's decision to deny the claim
  - Referral only warranted when BVA determines that the claimant is "unemployable by reason of service-connected disabilities"

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 89

---

---

---

---

---

---

---

---

**SNIDER V. MCDONOUGH** 

- CAVC held:
  - When first deciding whether extraschedular referral under § 4.16(b) is warranted, the evidence is considered under a **reasonable possibility** standard—and this holding applies to all TDIU extraschedular referral decisions
  - Ray's interpretation of § 4.16(b) and its holding—that the initial extraschedular referral considers whether there's sufficient evidence to substantiate a reasonable possibility that a Vet is unemployable because of SC disabilities—applies whether the Board referred the matter but ultimately denied benefits, or denied both the referral and benefits in the same decision
  - Remand was warranted for the Board to consider the evidence under the "reasonable possibility" standard

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 90

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE**



- When attempting to get an extraschedular TDIU claim referred to the Director of Compensation for consideration, argue that the evidence shows that there is at least a *reasonable possibility* that the Vet is unemployable because of SC disabilities
- But to ultimately be awarded TDIU, Vet will need to meet a higher standard—showing that it is *at least as likely as not* that the Vet is unable to secure and follow substantially gainful employment because of SC disabilities

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 91

---

---

---

---

---

---

---

---

**Perciavalle v. McDonough**  
 No. 17-3766  
 (Vet.App. Dec. 3, 2021)  
 (Update)



© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 92

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH**



Issues:

Was a CUE motion alleging that VA erred in 1972 by failing to assign separate ratings for knee disabilities based on a change in interpretation of the law and, if so, was any Board error in deciding this issue prejudicial?

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 93

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH**  **NVLSP**

**Underlying Legal Framework**

- Final VA decisions are subject to reversal or revision on grounds of CUE
  - 38 U.S.C. §§ 5109A, 7111; 38 C.F.R. §§ 3.105, 20.1403
- The elements of CUE are:
  1. Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions existing at the time were incorrectly applied
  2. The asserted error must be undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made, and not merely a disagreement as to how the facts were weighed or evaluated; and
  3. The error must have manifestly changed the outcome
    - *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 94

---

---

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH**  **NVLSP**

**Underlying Legal Framework**

- Review for CUE in a prior final decision “must be based on the evidentiary record and the law that existed when that decision was made.”
  - 38 C.F.R. §§ 3.105(a)(1)(iii); 20.1403(b)(1)
- CUE “does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation.”
  - 38 C.F.R. § 3.105(a)(1)(iv); see 38 C.F.R. § 20.1403(d)-(e)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 95

---

---

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH**  **NVLSP**

**FACTS**

- Sept. 1966: Vet awarded SC for left knee injury with a 10% rating for meniscectomy under DC 5259
- July 1971:
  - X-ray report stated, “The joint space is questionably narrowed medially and there does appear to be some slight blunting of the tibial spines. On one view there is a question of nodular irregularity of the medial condyle of the femur.”
  - Physician found that Vet had left knee flexion limited to 135 degrees and very slight instability of the joint
  - VA issued dating decision continuing 10% rating

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 96

---

---

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH** 

**FACTS**

- 1994: CAVC decided *Esteban v. Brown*, holding that separate ratings were warranted for non-duplicative symptoms of a disability
- 1997: VA's OGC issued a precedent opinion holding that a claimant who has arthritis and instability of the knee may be rated separately under DCs 5003 and 5257
  - VA Gen. Coun. Prec. 23-97 (July 1, 1997)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 97

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH** 

- Mar. 2015: Vet sought revision of the July 1971 decision, asserting that it contained CUE.
  - Argued he should have received separate 10% ratings for instability under DC 5257 and for arthritis with limitation of flexion under DC 5003-5260
- Sept. 2015: RO determined that no revision of the July 1971 decision was warranted “because the decision was properly based on the available evidence of record and the rules in effect at the time the issue was considered”

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 98

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH** 

- Sept. 2017: BVA denied Vet's CUE claim:
  - “The Veteran has not provided any evidence that, in July 1971, VA interpreted the rating schedule to allow for separate ratings for limitation of motion and instability of the same knee. Instead, the Veteran contends that a more recent interpretation of VA regulations should have retroactive effect. . . . Because a later interpretation of an existing regulation cannot constitute CUE and that is the only basis on which the Veteran asserts CUE, the Veteran's motion must be denied as a matter of law.”
- Vet appealed to the CAVC

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 99

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH** 

- Sept. 2019: CAVC panel reversed BVA's determination that Vet's CUE motion was prohibited as a matter of law because it depended on a changed interpretation of law
  - Found that a changed interpretation requires the existence of an *antecedent interpretation* from which a later interpretation departs, and because no prior interpretation existed in this case, the Court's 1994 decision in *Esteban* and the 1997 VA General Counsel opinion did not amount to a change in interpretation
- Dec. 2021, the full CAVC vacated the panel's 2019 decision and affirmed the BVA's decision

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 100

---

---

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH** 

- As in the vacated panel decision, the en banc CAVC found that the Vet's CUE motion was not based on a changed interpretation of law
  - "separate ratings for different knee disabilities were permissible in 1971, and the Board erred in suggesting otherwise. The Board also erred in characterizing 'a later interpretation of an existing regulation' as 'the only basis on which the Veteran asserts CUE,' and erred in concluding that the veteran's CUE assertion 'must be denied as a matter of law.' . . . The veteran's motion alleged CUE in how the RO applied the regulations in 1971, and the parties agreed that the measure of whether there was CUE was those regulations' plain language. In that context, the veteran was entitled to a decision on the merits of his motion."

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 101

---

---

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH** 

- BUT, the en banc CAVC held that the Board's error was harmless
  - According to the Court, the x-ray evidence relied upon by the Vet to show that he was entitled to a rating for knee arthritis was not undebatable
    - Notation of questionable joint irregularities in an x-ray report was not an arthritis diagnosis
    - Vet did not explain how the x-ray evidence from 1971 supported an arthritis diagnosis
    - Absent evidence of arthritis confirmed by x-ray, Vet couldn't meet his burden of showing that VA would have awarded a 10% rating for arthritis under DC 5003

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 102

---

---

---

---

---

---

---

---

---

---

**PERCIAVALLE V. MCDONOUGH** 

- Because BVA's denial of Vet's motion to revise the 1971 rating decision would not have been different even if BVA committed no error in its application of the CUE regulation, BVA's error did not affect the ultimate outcome of the decision.
- Vet did not demonstrate how BVA's legal error impacted its ultimate determination that the 1971 rating decision contained no CUE

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 103

---

---

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE** 

- Stay tuned... Vet recently appealed to Federal Circuit
- CAVC's finding that separate ratings for knee disabilities were warranted decades before *Esteban* is important!
  - "Since its inception in 1921, the rating schedule has included separate provisions for evaluating knee instability, limitation of leg extension, and meniscal problems [and] . . . no portion of the rating schedule pertaining to the knees [has] included an express prohibition on separate evaluation of those manifestations of disability..."
    - *Lyles v. Shulkin*, 29 Vet.App. 107, 115 (2017)
  - Many Vets were not granted separate ratings for knee disabilities in the past, despite having non-overlapping symptoms that could have been compensated under different DCs
  - If evidence undebatably shows that Vet had symptoms that qualified for separate ratings, file claim alleging CUE in RO or BVA decision that failed to assign separate ratings

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 104

---

---

---

---

---

---

---

---

---

---

**ADVOCACY ADVICE** 

- When alleging CUE, don't forget to clearly explain how the VA's error manifestly changed the outcome
  - Must show that absent the claimed clear and unmistakable error, the benefit sought would have been granted at the outset
  - Claimant must show that harm was suffered as a result of the VA's error

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 105

---

---

---

---

---

---

---

---

---

---

**QUESTIONS?**




© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 106

---

---

---

---

---

---

---

---

**UPCOMING WEBINARS**



March 2022:

A Guide to VA Benefits for Family Caregivers and the Beaudette Class Action

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 107

---

---

---

---

---

---

---

---

**LIBRARY OF PAST WEBINARS**



- Previous NVLSP webinars are available [here](https://productsbynvlsp.org/product-category/on-demand-webinars-vso-training/) (<https://productsbynvlsp.org/product-category/on-demand-webinars-vso-training/>)
  - Webinars are available for 72 hours after purchase
  - Topics include:
    - The New VA Appeals System (Appeals Modernization)
    - New Changes to VA's Non-Service Connected Disability Pension Program
    - VA Benefits for Disabilities Caused by VA Health Care (§ 1151 Claims): The Basics and Important New Developments

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 108

---

---

---

---

---

---

---

---

**NVLSP**  
**VA BENEFIT IDENTIFIER**



- Questionnaire/App: Helps Vets and VSOs figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to
- 3 WAYS to Access:  
NVLSP Website

Download on the  **App Store**     **Google play** ANDROID APP ON

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 109

---

---

---

---

---

---

---

---

**NVLSP TRAINING**  
**OPPORTUNITIES**



- NVLSP offers private in-person and webinar training tailored to the needs of your organization
- If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro, at [richard@nvlsp.org](mailto:richard@nvlsp.org)

© 2022 National Veterans Legal Services Program. All Rights Reserved. www.nvlsp.org 110

---

---

---

---

---

---

---

---